

Supreme Court, U. S.

FILED

JUN 25 1979

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78 - 1909

PHILIP CARCHMAN and MARILYN R. CARCHMAN,
Petitioners,

v.

THE KORMAN CORPORATION.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PAUL W. TRESSLER, ESQUIRE
Attorney for Petitioners
392 Souderton-Harleysville Pike
P. O. Box 98
Franconia, Pennsylvania 18924
(215) 723-8991

Parker H. Wilson, Esquire
WILSON, OEHRLER, DRAYER & FURBER
One East Airy Street
P.O. Box 389
Norristown, Pennsylvania 19404
(215) 277-3200

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of Case	3
Reasons for Granting Writ	5
I. Certiorari should be granted to resolve conflicts in principle among the Lower Courts	5
II. The class to which petitioners contend they belong is much more narrowly drawn than the class of tenant organizers which the Court of Appeals grouped petitioners and a proper 1985(3) class...	7
III. The intent of the statute was to protect life, liberty and property of citizens irrespective of the act of the State	9
Conclusion	10
Appendix A:	
Opinion of the United States Court of Appeals for the Third Circuit of March 13, 1979	11
Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.	15

TABLE OF CASES.

<i>Action v. Gannon</i> , 450 F.2d 1227 (6th Cir. 1971)	6
<i>Azar v. Conley</i> , 456 F.2d 1382 (6th Cir. 1972)	6
<i>Bellamy v. Mason's Stores, Inc.</i> , 368 F.Supp. 1025 (E.D.Va. 1973), <i>aff'd</i> 508 F.2d 504 (4th Cir. 1974) .	6
<i>Bricker v. Crane</i> , 468 F.2d 1228 (1st Cir. 1972), <i>cert.</i> <i>denied</i> 410 U.S. 930 (1973)	7
<i>Carchman v. Korman Corp.</i> , 456 F.Supp. 730, 735 (E.D.Pa. 1978)	2,5,6,7
<i>Denman v. Leedy</i> , 479 F.2d 1097 (6th Cir. 1973)	7
<i>Furumoto v. Lyman</i> , 362 F.Supp. 1267 (N.D.Cal. 1973)	7
<i>Griffin v. Breckenridge</i> , 403 U.S. 88 (1971)	4,6,8,9
<i>Jacobson v. Industrial Foundation of the Permian Basin</i> , 456 F.2d 258 (5th Cir. 1972)	7
<i>McLellan v. Mississippi Power & Light Co.</i> , 545 F.2d 919 (5th Cir. 1977) (<i>en banc</i>), <i>reversing</i> , <i>McLellan v.</i> <i>Mississippi Power & Light Co.</i> , 526 F.2d 879 (5th Cir. 1976).....	6,7
<i>Means v. Wilson</i> , 522 F.2d 833 (8th Cir. 1975), <i>cert.</i> <i>denied</i> 424 U.S. 958 (1975)	5,6
<i>Novotny v. Great American Federal Savings & Loan Ass'n.</i> , 584 F.2d 1235 (3d Cir. 1978) (<i>en banc</i>), <i>cert.</i> <i>granted</i> 99 S.Ct. 830 (1979)	8
<i>Westberry v. Gilman Paper Co.</i> , 507 F.2d 206 (5th Cir. 1975).....	5,6

STATUTES.

28 U.S.C. § 1254.....	2
28 U.S.C. § 1331.....	4
28 U.S.C. § 1343(1)	4
42 U.S.C. § 1985(3)	2,4,5,6,7,8,9

IN THE

Supreme Court of the United States

October Term, 1978

No.

PHILIP CARCHMAN and MARILYN R. CARCHMAN,
Petitioners,
v.

THE KORMAN CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of
the Supreme Court of the United States:

PHILIP CARCHMAN and MARILYN R. CARCHMAN,
the Petitioners herein, pray that a Writ of Certiorari issue to
review the Judgment of the United States Court of Appeals
for the Third Circuit entered in the above-entitled case on
March 13, 1979.

Opinions Below

The Opinion of the United States Court of Appeals for the
Third Circuit is currently unreported and is printed in Ap-

pendix A hereto, *infra*, page 11. The Opinion and Order of the United States District Court for the Eastern District of Pennsylvania is reported at 456 F.Supp. 730 (E.D.Pa. 1978) and is printed in Appendix A hereto, *infra*, page 15.

Jurisdiction

The Judgment of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*, page 14) was entered on March 13, 1979. The Jurisdiction of the Supreme Court is invoked under 62 Stat. 928, 28 U.S.C. § 1254.

Question Presented

The question presented in this case is whether tenant members of a tenant's association, or tenant's rights advocates living in a large private apartment complex may constitute a class protected by 42 U.S.C. § 1985(3) from conspiracies founded upon a "class-based, invidiously discriminatory animus."

Statute Involved

Civil Rights Act of 1871, c. 22, 17 Stat. 13, 42 U.S.C. § 1985(3) reads as follows:

Conspiracy to interfere with civil rights.

* * *

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering

the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Statement of Case

This case was commenced by Petitioners following the nonrenewal of their lease at Meadowbrook Apartments (Meadowbrook) by the Korman Corporation in July of 1975. Prior to the nonrenewal by Korman, Petitioner Philip Carchman was active in the Meadowbrook Tenants' Association (MTA) and at one time was an officer in the MTA. The MTA is a non-profit corporation organized under the laws of the Commonwealth of Pennsylvania.

Prior to Korman and the Meadowbrook Partnership, the owners of Meadowbrook, terminating the Carchman's lease, there had been a long period of considerable friction between Korman and the MTA, particularly over Korman's method of charging Meadowbrook tenants for electricity. This dispute spawned several lawsuits, one against the Meadowbrook Part-

nership and Korman alleging violation of the Pennsylvania Resale of Utilities Act and one by Korman against named members of the MTA for an injunction against MTA demonstrations and picketing in front of Meadowbrook's sample apartment. Philip Carchman was a complainant in the suit against Korman and the Meadowbrook Partnership and was a named defendant in Korman's suit to enjoin MTA picketing.

In June of 1975 Korman informed Carchman that his lease was not to be renewed beyond September 30, 1975. Upon further inquiry by Philip Carchman, Korman informed Carchman by letter dated July 1, 1975 that his lease was being terminated due to the long standing belief of Korman and Meadowbrook Partnership that Carchman was consistently working against the aims and desires of the Meadowbrook Management and Partnership.

This suit was filed in United States District Court for the Eastern District of Pennsylvania in July of 1977 after attempts to negotiate the problem was fruitless. Jurisdiction of the District Court was based upon 28 U.S.C. §§ 1331 and 1343 (1). The District Court dismissed the Carchman's complaint finding a group of tenant's association members did not constitute a proper 1985(3) class under *Griffin v. Breckenridge*, 403 U.S. 88 (1971) and the United States Court of Appeals for the Third Circuit affirmed the Judgment of the District Court, classifying the Carchmans as "tenant organizers" and holding tenant organizers were not a protected class under 42 U.S.C. § 1985(3).

REASONS FOR GRANTING WRIT

I.

Certiorari should be granted to resolve conflicts in principle among the Lower Courts.

The issue in this case is whether a tenants' association whose members actively exercise their right of free speech and association in advocating tenants' rights, the exercise of which right is protected by the first amendment to the federal constitution, constitutes a proper class which can maintain a civil action against a private conspiracy to deprive its members of such rights under the Civil Rights Act of 1871, 42 U.S.C. § 1985(3).

The cases in the Lower Court which have approached this issue, as noted by the District Court in its Opinion below, have reached "discordant, if not irreconcilable conclusions" on the issue. *Carchman v. Korman Corp.*, 456 F.Supp. 730, 735 (E.D.Pa. 1978). Thus, a substantial federal question is involved relating to the uniform enforcement of the Federal Civil Rights Laws.

The District Court found the decisions revolved around two major decisions involving the definition of class under section 1985(3). The first group was typified by the Eighth Circuit's Decision in *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975), *cert. denied* 424 U.S. 958 (1975). In *Means*, the Eighth Circuit found a cognizable class under section 1985(3) in a group of political supporters of Russell Means, a candidate for president of the Oglala Sioux Tribal Council. The Eighth Circuit used a test devised by the Fifth Circuit in *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975) which is stated as follows:

There need not necessarily be an organizational structure of adherents, but there must exist an identifiable body

with which the particular plaintiff associated himself by some affirmative act. It need not be an oath of fealty; but at least it must have an intellectual nexus which has somehow been communicated to, among and by the members of the group.

522 F.2d at 859-40. (Citing *Westberry, supra* at 215). While the Eighth Circuit noted that the opinion had later been withdrawn by the Fifth Circuit because of mootness, the Eighth Circuit found its reasoning valid in light of *Griffin v. Breckenridge*, 403 U.S. 88 (1971). 522 F.2d at 840.

Using this test, which the District Court below dubbed the "intellectual nexus" test (456 F.Supp. at 736), or a process similar to it, the following groups have been found to constitute proper *Griffin* classes under section 1985(3): Political group supporting candidate for Indian tribal council President, *Means v. Wilson, supra*; a white middle-class family, *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972); a religious group, *Action v. Gannon*, 450 F.2d 1227 (6th Cir. 1971); and a group of persons asserting their first amendment rights, *Bellamy v. Mason's Stores, Inc.*, 368 F.Supp. 1025 (E.D.Va. 1973), aff'd 508 F.2d 504 (4th Cir. 1974).

The second group of decisions defining a section 1985(3) class in light of *Griffin* was grouped by the District Court around *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (*en banc*), (*McLellan II*), reversing, *McLellan v. Mississippi Power & Light Co.*, 526 F.2d 879 (5th Cir. 1976) (*McLellan I*). The District Court found the *McLellan II*'s sense of "class" is composed of two different notions: (a) those classes which have been specially protected by the various historic and modern civil rights laws; and (b) those classes who assert "fundamental" rights. *Carchman v. Korman Corp.*, 456 F.Supp. at 737.

In *McLellan II* the Fifth Circuit decided that petitioners in bankruptcy do not constitute a cognizable class under section 1985(3). Similarly, the following groups were found *not to* constitute proper section 1985(3) classes: workman's compensation claimants, *Jacobson v. Industrial Foundation of the Permian Basin*, 456 F.2d 258 (5th Cir. 1972); doctors who testified against other doctors in medical malpractice cases, *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972), cert. denied 410 U.S. 930 (1973); non-white opponents of racism, *Furumoto v. Lyman*, 362 F.Supp. 1267 (N.D.Cal. 1973); victims of domestic strife, *Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973); and members of a private apartment tenants' association, *Carchman v. Korman Corp.*, 456 F.Supp. 730 (E.D.Pa. 1978), aff'd No. 78-2178 (3d Cir., filed March 13, 1979).

Due to the considerable disparity of views as to what constitutes a proper class at which a section 1985(3) conspiracy may be directed, a plaintiff's wrong may have a remedy in one jurisdiction and have none in another, in spite of the fact that an identical statute covers both situations. The need for uniform enforcement of federal civil rights laws calls for certiorari to be granted in this matter.

II.

The class to which petitioners contend they belong is much more narrowly drawn than the class of tenant organizers which the Court of Appeals grouped petitioners and a proper 1985(3) class.

The Court of Appeals in its Opinion below held that a class of "tenant organizers" did not constitute a proper class under 42 U.S.C. § 1985(3).

The class of "tenant organizers" as found by the Court of Appeals could be practically infinite as almost anyone with a mind could become a tenant organizer. However, the Carchmans are not nor have they ever claimed to be tenant organizers. The Court of Appeals was justified in holding a class of tenant organizers does not qualify under the *Griffin v. Breckenridge, supra*, interpretation of a proper section 1985(3) class.

The Carchmans have never alleged nor contended that they were tenant organizers. Rather, they were active members of an already organized tenant's association, with a narrowly defined membership.

The tenant's association to which the Carchmans belonged had a formal organizational structure, it was organized as a non-profit corporation under the laws of the Commonwealth of Pennsylvania, and had an easily recognized membership.

It is *this* class which the Carchmans contend is a proper class for protection under section 1985(3).

The class of tenants' association members of which the Carchmans claim to be members is a fairly narrowly drawn one. While membership in such a class is not an "accident of birth" which the Third Circuit Court of Appeals held to be so important in the Opinion below and in its previous Opinion in *Novotny v. Great American Federal Savings & Loan Ass'n.*, 584 F.2d 1235 (3d Cir. 1978) (*en banc*), cert. granted 99 S.Ct. 830 (1979), membership in such a class requires certain affirmative acts on the part of class members. It requires that they be tenants, and that they support in some way, either financially or otherwise, the goals of the association. Simply put, one cannot be a member of the class simply by saying they are, it takes more.

Finally, the Court below erred in insinuating that only classes whose members have "immutable characteristics" for which the class members have no responsibility are proper section 1985(3) classes. If that were true, religion would not be a protected class as religion is not an immutable characteristic as is race, sex, or age.

The misplaced reliance by the Court of Appeals on requiring "immutable characteristics" for proper section 1985(3) class and the placing of the Carchmans in an improper class which was not supported by the allegations or record below require that certiorari be granted in this matter.

III.

The intent of the statute was to protect life, liberty and property of citizens irrespective of the act of the State.

During Congressional debate prior to passage of what is now 42 U.S.C. § 1985(3), the remarks made by proponents of the statute evincing a clear intent that the statute was to reach individuals and not States. It was thought to be a less radical course to deal directly with individuals and would work less interference with local governments. See, *Griffin v. Breckenridge*, 403 U.S. at 100-101.

The interests sought to be protected here are those protected by the first amendment to the federal constitution, that of free speech and association. It is not a case where one citizen assaults another, it is one where a conspiracy is alleged to have interfered with the Carchmans' rights of free speech and association with respect to their tenants' association activities. Such rights should definitely come under the statute's protection of the Carchmans' liberty interest from private conspiracies.

Due to the importance of the liberty interest involved in this matter, certiorari should be granted.

Conclusion

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PAUL W. TRESSLER, ESQUIRE,
Counsel for Petitioners.

June 19, 1979

APPENDIX A**Opinion of the United States Court of Appeals
for the Third Circuit of March 13, 1979****UNITED STATES COURT OF APPEALS
For the Third Circuit**

No. 78-2178

**CARCHMAN, PHILIP AND
CARCHMAN, MARILYN R.,**

Appellants,

v.

THE KORMAN CORPORATION.

**Appeal From the United States District Court
For the Eastern District of Pennsylvania**

D.C. Civil No. 77-2477

Argued February 21, 1979

**Before ROSENN, VAN DUSEN, and GARTH,
Circuit Judges.**

(Opinion filed March 13, 1979)

**Paul W. Tressler, Esquire, 392 Souderton-Harleysville
Pike, P.O. Box 98, Franconia, Pa. 18924, Attorney for Ap-
pellants.**

**Barbara Etkind, Wolf, Block, Schorr and Solis-Cohen,
Twelfth Floor, Packard Building, Philadelphia, Pa. 19102,
Attorney for Appellee.**

Appendix A—Opinion of the United States Court of Appeals for the Third Circuit of March 13, 1979.

OPINION OF THE COURT

ROSENN, *Circuit Judge*

In this appeal we must decide whether tenant organizers of a large luxury apartment complex may constitute a class protected by 42 U.S.C. § 1985(3) (1976) against conspiracies founded upon a "class-based, invidiously discriminatory animus." *See Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). Concluding that the class of tenant organizers is beyond the reach of the statute, we affirm the judgment of the district court.

The appellants, Philip and Marilyn Carchman, were tenants in an apartment complex managed by the appellee, the Korman Corporation. As the Carchmans alleged in their complaint, Philip Carchman was an officer in the tenants' association for the complex and an advocate of tenants' rights. He participated in a criminal action brought against the Korman Corporation in state court. Solely because of Philip Carchman's activities as a tenant organizer, the Carchmans have asserted, the Korman Corporation refused to renew their lease. The Carchmans instituted a suit for damages in the United States District Court for the Eastern District of Pennsylvania, contending in the amended complaint that the Korman Corporation had violated the Carchmans' rights under the first amendment and had conspired, in contravention of 42 U.S.C. § 1985(3), to deprive them of equal protection of the laws or of equal privileges and immunities under the laws. Because the Carchmans did not allege any state action, the district court dismissed their claim based on the first amendment, and this dismissal has not been

Appendix A—Opinion of the United States Court of Appeals for the Third Circuit of March 13, 1979.

appealed. The district court also dismissed the count under 42 U.S.C. § 1985(3), for failure to state a claim upon which relief could be granted. This appeal ensued.

Section 1985(3), in part, forbids conspiracies entered into "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . ." Seeking to avoid possible constitutional problems, the Supreme Court has interpreted this language to mean that "there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge, supra*, 403 U.S. at 102 (footnote omitted). The Court did not specify what classes, other than racial ones, might be protected by the statute. The Carchmans argue that "class-based, invidiously discriminatory animus" directed against tenant organizers comes within the scope of Section 1985(3).

In *Novotny v. Great American Federal Savings & Loan Association*, 584 F.2d 1235 (3d Cir. 1978) (*en banc*), cert. granted, 447 U.S.L.W. 3463 (Jan. 8, 1979), this court recently held that classes distinguished by gender fall within the statute. Although reserving the question of what other classes might qualify, the court expressed the following rationale for its conclusion that an animus against women could underlie a violation of the statute:

The principle that individuals should not be discriminated against on the basis of traits for which they bear no responsibility makes discrimination against individuals on the basis of immutable characteristics repugnant to our system. The fact that a person bears no responsibility

Appendix A—Opinion of the United States Court of Appeals for the Third Circuit of March 13, 1979.

for gender, combined with the pervasive discrimination practiced against women, and the emerging rejection of sexual stereotyping as incompatible with our ideals of equality convince us that whatever the outer boundaries of the concept, an animus directed against women includes the elements of a "class-based invidiously discriminatory" motivation.

Id. at 1243 (footnotes omitted). *Novotny* did not define the "outer boundaries" of class-based animus but the analysis in that case is sufficient to show that tenant organizers do not constitute a class protected by the statute. Unlike racial or sexual animus, animus against tenant organizers is not based upon "immutable characteristics" for which the members of the class have no responsibility.¹ Nor are we persuaded that tenant organizers have been the victims of the historically pervasive discrimination practiced against women.

We therefore hold that tenant organizers do not constitute one of the classes protected by 42 U.S.C. § 1985(3) against class-based animus. The judgment of the district court will be affirmed. Costs taxed against the appellants.

A True Copy:

Teste:

*Clerk of the United States Court
of Appeals for the Third Circuit*

¹ Being a tenant organizer is not an "accident of birth." See *Novotny v. Great American Federal Savings & Loan Ass'n.*, *supra*, 584 F.2d at 1243.

Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PHILIP CARCHMAN and MARILYN R. CARCHMAN, h/w,

v.

THE KORMAN CORPORATION.

**CIVIL ACTION
NO. 77-2477**

OPINION AND ORDER

EDWARD R. BECKER, J.

JULY 21, 1978

I. Preliminary Statement

This is a civil rights action which requires us to define the character of the "classes" against which a 42 U.S.C. § 1985(3) conspiracy may properly be directed. The plaintiffs allege that their apartment lease was not renewed by defendant, the operator of a large private apartment complex, in order "to stifle and discourage (husband) plaintiff's exercise of his freedom of speech and association" as an active member of a tenants association at the apartment complex. The 12(b)(6) motion before us presents the question whether a 1985(3) conspiracy may be directed against the members of a private tenants association in light of the "class-based animus" requirement set forth in *Griffin v. Breckenridge*, 403 U.S. 88 (1971). Concluding that such members do not constitute a proper *Griffin* "class," we dismiss the complaint.

¹ Jurisdiction is invoked under 28 U.S.C. §§ 1331 and 1333(1). Even though the latter does not require a jurisdictional amount, plaintiffs have alleged that their damages, including the cost of moving, medical care, emotional trauma to Mrs. Carchman, and infringement of First Amendment rights, are in excess of \$10,000.

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

The first ten paragraphs of plaintiffs' amended complaint are based solely on the First Amendment, rather than on any civil rights act. They need not detain us. The First Amendment by its terms protects against "Congress . . . mak[ing] [a] law . . . abridging the freedom of speech. . . ."

It is, of course, a common place that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. . . . Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the constitution itself.

Hudgens v. N.L.R.B., 424 U.S. 507, 513 (1976). Since plaintiffs have made no allegations of state or federal action, the first ten paragraphs of the amended complaint must be dismissed for failure to state a claim upon which relief can be granted.

More troublesome is the 1985(3) claim.² The amended complaint alleges that defendant and its agents conspired with the Meadowbrook Valley Partnership, the owner of the development, and its agents, to deprive plaintiffs of their First and Fourteenth Amendment rights to speech and association, and that they acted, in furtherance of the conspiracy, by failing to renew plaintiffs' lease. It further alleges that the conspiracy was in retaliation for the plaintiffs' participation in the

² The original complaint was based solely on the First Amendment. When defendant moved to dismiss on the basis that no state action had been alleged, plaintiffs sought leave to amend to include a cause of action under 42 U.S.C. § 1985(3). Leave was granted. The 1985(3) claim makes up the balance of the (amended) complaint.

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

tenants association. Defendant has moved to dismiss the § 1985(3) claim on three grounds. First, defendant contends that the complaint contains insufficient allegations of a conspiracy in that the alleged co-conspirators are mere agents (or alter egos) of the defendant and that one cannot conspire with oneself. Second, defendant contends that the complaint does not allege a sufficient class-based animus to meet the requirements of § 1985(3). Third, defendant asserts that § 1985(3) can only protect the right of free speech from governmental interference, federal or state, and that there is simply no cognizable right under § 1985(3) to be protected from wholly private infringement of the exercise of the rights of speech or association.

This latter point is a most difficult one, on which the law is far from clear.³ Fortunately, however, we need not reach it.

³ The issue is whether § 5 of the Fourteenth Amendment empowers Congress to reach private violations of substantive rights secured by the Fourteenth Amendment (including, of course, those parts of the Bill of Rights incorporated therein), or whether, alternatively, the substantive rights secured by the Fourteenth Amendment and hence protected by § 1985(3) are protected only against state and not private infringement. A subsidiary issue, given the fact that it is the plaintiff's tenants rights advocacy which is said to have motivated defendants' actions, is whether, even if most rights are protected only against state, not private, infringement, First Amendment rights call for a different result because of the "special deference" owed that amendment. See *Cohen v. Illinois Institute of Technology*, 524 F.2d 818, 829 n.33 (7th Cir. 1975).

The 4th and 7th Circuits have held that the substantive rights protected by the Fourteenth Amendment are only protected from state, not private, infringement. *Cohen, supra*; *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974); *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972). Moreover, the 7th Circuit recently resolved the question left open in *Cohen* by holding that an allegation of infringement of a First Amendment

(Footnote continued on following page)

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

(Footnote continued from preceding page)

right did not call for any different conclusion. *Murphy v. Mount Carmel High School*, 543 F.2d 1189 (7th Cir. 1976).

In contrast, the 8th Circuit has held that the rights secured by the Fourteenth Amendment are protected from private, as well as state, conspiracies. *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971). Although *Gannon* involved the First Amendment freedom of religion, the court's conclusion did not rest on a narrow First Amendment exception, as suggested later by *Cohen*, but rather on the general conclusion that *all* Fourteenth Amendment rights are protected under § 1985(3) from private infringement.

The 3rd Circuit's opinion in *Richardson v. Miller*, 446 F.2d 1247 (3d Cir. 1971) sustained a cause of action under § 1985(3) where plaintiff alleged he had been fired from his job for criticizing his employer's racially discriminatory employment policies, and for advocating the election of politicians who promised to ameliorate racial prejudice. His employer was wholly private. The result in *Richardson* implicitly supports *Gannon's* conclusion, although it must be emphasized the court did not address this question squarely in the opinion. It is thus difficult for us to tell whether *Richardson* is binding precedent on this issue or not, although at least to Judge, now Justice, Stevens, the *Richardson* decision aligned the 3rd Circuit with the 8th Circuit's *Gannon* decision. See *Cohen, supra*, at 829 notes 31 and 33.

The complexity of this issue is, perhaps, best demonstrated by Judge Spencer Williams' recent opinion in *Baer v. Baer*, No. C-77-0550 SW, 46 U.S.L.W. 2565 (N.D.Cal. April 14, 1978). Judge Williams, after analyzing the Supreme Court and various Circuit decisions on the subject, decided that the question was enormously complex and that therefore it would be "unsound" for a federal trial court to follow *Gannon* in the absence of clear Supreme Court authority that § 5 of the Fourteenth Amendment empowered Congress to reach private conspiracies to violate First Amendment rights.

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

For, while it appears that plaintiffs can, at this stage, survive a motion to dismiss on the first asserted ground,⁴ the complaint fails the class-based animus test, requiring dismissal.

⁴ Plaintiffs' allegation of conspiracy is as follows:

13. Between May of 1973 and September 30, 1975, defendant Korman Corporation along with their agents, Williams C. Liss, General Manager of Meadowbrook Apartments, and Steven A. Arbittier, Esquire, and J.E. Dratch, M.B. Dratch, M. Dratch, H.A. & L. Honickman, B.E. Korman, L.I. Korman, S.H. Korman, S.J. Korman, J.M. Lansfield, I.B. Moss, S.R. Moss, E. Taxin, M.A. Taxin Grabov and R.N. Taxin, trading as the Meadowbrook Valley Partnership with a business address at 101 Greenwood Avenue, Jenkintown, Pennsylvania 19046, maliciously and with intent to injure Plaintiffs, conspired together. . .

The syntax and punctuation are not a model of clarity. It appears to us that the conspirators alleged are (1) the Korman Corporation and their agents, Liss and Arbittier; and (2) the Meadowbrook Valley Partnership and its fifteen members. Defendant Korman Corporation is alleged to be Managing Agent of the Meadowbrook Apartments (¶4). The partnership is elsewhere alleged to be the owner of the Meadowbrook Apartments, where plaintiffs lived until their lease was terminated (¶¶4, 14). Liss is alleged to be an agent of the Korman Corporation, and also to be the General Manager of the Meadowbrook Apartments (¶13 quoted above). Hence the only defendant in this suit—the Korman Corporation—is apparently a conspirator because one or more of its employees allegedly conspired with the apartment owners to terminate the lease; the individual employees' actions are apparently attributable to the defendant under the doctrine of *respondeat superior*.

The issue is whether, assuming the actions of Liss and Arbittier *et al* were within the scope of their employment so that any actions taken by them are attributable to the corporation (there is no allegation to this effect, but defendant has not challenged its absence, and we will assume it for purposes of this motion), the allegation that a corporation acting as managing agent conspired with the landlord can state a 1985(3) claim of conspiracy as a matter of law.

Defendant relies on *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) which took the position that

(Footnote continued on following page)

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

(Footnote continued from preceding page)

... the statutory requirement that 'two or more persons . . . conspire or go in disguise on the highway,' is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm. We do not suggest that an agent's action within the scope of his authority will always avoid a conspiracy finding. Agents of the Klan certainly could not carry out acts of violence with impunity simply because they were acting under orders from the Grand Dragon. *But if the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute.*

Id. at 196 (emphasis supplied).

The *Dombrowski* rationale, based on principles evolved in antitrust law about permissible conspirators under the *Sherman Act*, see *Cole v. University of Hartford*, 391 F.Supp. 888 (D.Conn 1975), is limited to a situation where individual conspirators are employees of a single corporation. It has no application when two distinct business entities are alleged to have conspired together, for *Dombrowski* speaks of "two or more agents" of a "single business entity" (emphasis supplied). Hence, the issue before us is whether there really are distinct business entities alleged.

In this case the pleadings state that there are two discrete business entities involved, the Meadowbrook Valley Partnership (owner of the realty) and the Korman Corporation which has been designated by the Partnership as its "managing agent." It may well be that discovery will disclose that the Meadowbrook Partnership and the Korman Corporation are in reality a single business enterprise. However, on the present record there are two presumably discrete business entities, hence the complaint appears to pass muster under *Dombrowski*. In any event the complaint would survive a motion to dismiss under *Columbia Metal Culvert Company v. Kaiser Aluminum*, No. 77-1846 (3d Cir. 5/24/78), which held that a corporate parent and its wholly-owned subsidiary with whom it shared significant joint management organization could legally conspire together for purpose of *Sherman* § 1. *Columbia Metal* thus re-affirmed the vitality of the "intra-enterprise conspiracy" theory as applied to separately incorporated entities for *Sherman* § 1 purposes, see slip opinion at 21, a legal principle which we take to be equally applicable to a § 1985(3) conspiracy.

Therefore, we find plaintiffs allegation as to the existence of a conspiracy sufficient to withstand a motion to dismiss.

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

II. Discussion

A. Elements of the § 1985(3) Cause of Action

Paragraphs 11-19 of the amended complaint invoke 42 U.S.C. § 1985(3). The elements of this cause of action were enumerated in *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971):

- (1) the defendants must conspire
- (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and
- (3) the defendants must act in furtherance of the object of the conspiracy, whereby
- (4) one was (a) injured in his person or property or (b) deprived of having and exercising any right or privilege of a citizen of the United States.

The remainder of this opinion is addressed to element 2, namely whether a sufficient conspiratorial purpose has been alleged.

B. Sufficiency of Allegation of Conspiratorial Purpose—the Class-Based Animus

The second element of a § 1985(3) suit identified by *Griffin, supra*, is a *mens rea* requirement—that the conspirators have a particular kind of purpose. By its terms, § 1985(3) requires that purpose to be one:

... of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

Griffin, supra, gave to this section, which is very expansive on its face, a gloss in order to prevent § 1985(3) from becoming "a general federal tort law." 403 U.S. at 102. That gloss was the requirement for there to be:

as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. . . . The language requiring intent to deprive of *equal* protection or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.

Id. (Emphasis in original.) As we read *Griffin's* language, the requirement means that motivating the conspiracy there must be a discriminatory animus toward a *class*, not toward an individual *qua* individual. In other words, the conspirators must possess a class-based state of mind. As such, the *Griffin* gloss in effect eliminates the words "any person" from the phrase "for the purpose of depriving . . . any person or class of persons."

The second effect of the *Griffin* gloss is to suggest that not just any class-based animus on the part of the conspirators will suffice. § 1985(3) on its face states "any . . . class," but *Griffin* narrows "any . . . class" to "racial or perhaps otherwise class-based" conspiratorial motivation. Does this inferentially suggest that the class-based animus motivating the conspiracy be only racial, or at least *like* racial animus? *Griffin* expressly left this question open, stating, "we need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us." *Id.* at 102 n.9. *Griffin* created further ambiguity

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

by then citing, without comment, legislative history suggesting that intended classes included "Vermonters," "Catholics" and "Democrats." See legislative history cited *id.*

In the face of this suggestive but equivocal language, our task is to decide whether *Griffin's* requirement of "racial or perhaps otherwise class-based invidiously discriminatory animus" is satisfied by an allegation of a conspiracy on the part of private business entities directed against a tenants association at a private apartment complex, *i.e.* a group of individuals asserting tenants rights.⁵ Is a conspiracy against such an association "class based" within the meaning of *Griffin*? Otherwise put, is a private tenants association a *Griffin* "class" at which a § 1985(3) conspiracy can be directed?

Given the ambiguity of *Griffin*, it is not surprising that lower court cases since that decision have reached discordant, if not irreconcilable, conclusions. Most of these cases have been collected and analyzed in two recent articles, Comment, "Private Conspiracies to Violate Civil Rights," 90 *Harvard L. Rev.* 1721 (1977), and Note, "The Scope of Section 1985(3) Since *Griffin v. Breckenridge*," 45 *George Wash. L. Rev.* 239 (1977), and in the recent decision by Judge Spencer Williams

⁵ Plaintiffs' complaint, as originally filed and as first amended, contained no allegation of class-based animus. Rather, the complaint simply alleged a conspiracy directed against plaintiffs. Omission of an allegation of class-based animus would have required our dismissal of the complaint under *Waits v. McGowan*, 516 F.2d 203, 208 (3d Cir. 1975). At a status conference, however, plaintiffs made what we viewed as a good-faith allegation that the alleged conspiracy was directed toward the class of tenant association members, not simply against the plaintiffs individually. Accordingly, we permitted a second amendment to the complaint, which involved an allegation of a conspiracy motivated by invidiously discriminatory animus against the class of tenant association members.

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

in *Baer v. Baer*, No. C-77-0550 SW, 46 U.S.L.W. 2565 (N.D.Cal. April 14, 1978). Our observation about the multitude of disparate and incompatible conclusions in the caselaw is demonstrated by comparing two groups of cases.

The first group found cognizable classes under *Griffin*. See *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975) cert. denied, 424 U.S. 958 (1976) (political group supporting candidate for Indian tribal council President); *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972) (single white, middle-class family); *Action v. Gannon*, 450 F.2d 1227 (6th Cir. 1971) (religious group); *Baer v. Baer*, No. C-77-0550 S.W., 46 U.S.L.W. 2565 (N.D.Cal. April 14, 1978) (religious group); *Brown v. Villanova University*, 378 F.Supp. 342 (E.D.Pa. 1972) (student committee); *Bellamy v. Mason's Stores, Inc.*, 368 F.Supp. 1025 (E.D.Va. 1973), aff'd 508 F.2d 504 (4th Cir. 1974) (persons asserting First Amendment rights); *Stern v. Massachusetts Indemnity and Life Insurance Co.*, 365 F.Supp. 433 (E.D.Pa. 1973) (women); *Mandelkorn v. Patrick*, 359 F.Supp. 692 (D.D.C. 1973) (religious group); *Franceschina v. Morgan*, 346 F.Supp. 833 (S.D.Ind. 1972) (those who aid migrant workers) and *Folgueras v. Hassle*, 331 F.Supp. 615 (W.D.Mich. 1971) (migrant workers themselves)

The second group found no cognizable class under *Griffin*. See *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (petitioners in bankruptcy); *Denman v. Leedy*, 479 F.2d 1097 (6th Cir. 1973) (victims of domestic strife); *Bricker v. Crane*, 468 F.2d 1228 (1st Cir. 1972) cert. denied 410 U.S. 930 (1973) (physicians testifying in malpractice cases); *Taylor v. Nichols*, 409 F.Supp. 927 (D.Kan. 1976) (policemen); *Furumoto v. Lyman*, 362 F.Supp. 1267 (N.D.Cal. 1973)

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

(political protesters); *Arnold v. Tiffany*, 359 F.Supp. 1034 (C.D.Cal. 1973) (newspapers dealers association).

When we look to the caselaw, not for specific results, but for guiding principles of adjudication which are transferable to our factual situation, we find in two of the cases, one from each of the two groups, helpful statements of (contrasting) conceptualizations of the meaning of *Griffin*'s class-based animus requirement. The expansive interpretation is found in the Eighth Circuit's *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975). The *Means* test for defining the "classes" against which class-based animus may be directed is:

There need not necessarily be an organizational structure of adherents, but there must exist an identifiable body with which the particular plaintiff associated himself by some affirmative act. It need not be an oath of fealty; it need not be an initiation rite; but at least it must have an intellectual nexus which has somehow been communicated to, among, and by the members of the group.

For shorthand, we will call this the "intellectual nexus" test.⁶

A considerably more restrictive test was formulated in *McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919 (5th Cir. 1977) (en banc), (*McLellan II*), reversing, *McLellan v. Mississippi Power & Light Co.*, 526 F.2d 879 (5th Cir. 1976) (*McLellan I*). The *McLellan II* court decided that individuals who filed petitions in bankruptcy were not a cognizable class against which class-based animus could be directed. While not deciding the exact scope of *Griffin*, and in fact leaving open the possibility, as *Griffin* did itself, that only racial

⁶ This test was originally formulated in *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975) and then withdrawn by the Fifth Circuit en banc. *Id.* at 215.

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

animus would suffice, 545 F.2d at 929, the *McLellan II* court identified two categories of "classes" as falling within the permissible definition of class for class-based animus purposes. The first are those "classes" of minorities protected by both Reconstruction and modern civil rights laws: classes defined by race, color, religion, national origin, gender, *et alia*. 545 F.2d at 932. Second are classes of persons who assert rights considered "fundamental." *Id.* Finding that those filing for bankruptcy satisfied neither construct, the *McLellan II* court held such petitioners were not a cognizable class for § 1985(3) purposes. *Id.* at 933.

Our initial task is to choose between the "intellectual nexus" test of *Means* and the *McLellan II* formulation. We reject *Means* for several reasons. First, we believe it interprets the *Griffin* language in altogether too expansive a fashion. *Griffin*, it will be remembered, required a "racial or perhaps otherwise invidiously discriminatory class-based animus"; *Means* converts this to an "identifiable body" with commonly shared views. "Invidiously discriminatory class-based" connotes to us something akin to the "discrete, insular minorities" described in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938)—in other words: (1) a class that has more stable, well-defined characteristics than merely sharing views in common, and (2) a class whose stable, well-defined characteristics have historically been vulnerable to prejudice by the society at large. The *Means* test does not reflect either of these connotations of *Griffin*'s use of "class." As we see it, neither the sense nor the language of *Griffin* is susceptible of the interpretation that the Supreme Court was thinking in terms of an animus directed against any group

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

whose members have only an intellectual nexus in common. For that reason alone we must reject the *Means* test.⁷

Our second reason for rejecting *Means* is that the "intellectual nexus" criteria are vague, amorphous, and boundless, in the sense that a virtually limitless number of classes fall within its ambit. Indeed, it is difficult to imagine an aggregation of two or more individuals who would *not* satisfy the *Means* requirement. A member of a group of disco dancers, or vegetarians, or backgammon players, who sued alleging that he or she had been impeded in the pursuit of his or her endeavors because of the advocacy or practice thereof might easily satisfy *Means*; at least we can think of no principled basis why he or she would not. *A fortiori* the tenants association in the case *sub judice*, which would likely have a more sustained organizational structure than the hypothesized groups above, would qualify. And yet *Griffin* clearly evinces the intention that § 1985(3) *not* become "a general federal tort law," 403 U.S. at 102. Adopting the *Means* standard would help convert § 1985(3) into precisely such a generalized tort statute.

Rejecting *Means* does not necessarily mean we embrace *McLellan II*'s formulation; we must in turn examine it. We earlier found *McLellan II*'s sense of "class" to be composed of two different notions: (a) those classes which have been specially protected by the various historic and modern civil rights laws (and to us this includes *a fortiori* the "suspect

⁷ See *Arnold v. Tiffany*, 359 F.Supp. 1034, 1036 (C.D.Cal. 1973), where the Court stated: "A close reading of *Griffin* leads this Court to conclude that the words 'class-based, invidiously discriminatory animus' refer, at most, to that kind of irrational and odious class discrimination akin to racial bias—such as discrimination based on national origin or religion."

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

classes" of race, alienage, and the like identified by the Supreme Court under equal protection analysis); and (b) those classes who assert "fundamental" rights.

We embrace the first of *McLellan's* two constructs of class, and determine that "invidiously discriminatory class-based animus" in all likelihood includes a conspiracy directed, *inter alia*, against racial, religious, and gender-based classes, classes of aliens, undoubtedly some, if not all, ethnic classes, as well as recent additions such as the class of aged persons (protected by ADEA, 29 U.S.C. § 621 *et seq.*)⁸ We do not intend the foregoing to be an exhaustive or precise catalogue, for there may well be other recent federal legislative protections which can properly be held to define a *Griffin* class. Nor need we decide that any particular group above is in fact a proper class. As it was for the court in *McLellan II*, it is sufficient here for us to identify the approximate description of those classes which have been legislatively and judicially determined to be especially vulnerable to discrimination by society at large and therefore in especial need of protection.

⁸ Limiting the class-based animus in this manner gives 1985(3) a meaningful, complementary role in relation to other civil rights act. It would not be duplicative of existing laws. For example, while the "class-based animus" requirement would, by and large, protect the same classes protected by Title VII, the interests protected are arguably broader because they relate to conditions other than employment; similarly, 1985(3) would have no exhaustion of administrative remedies hurdle. On the other hand, 1985(3) would be more restrictive than Title VII both because it requires a "conspiracy" and because the requirement of proof of "class-based animus" would seem to require more than the *mens rea* requirement of Title VII. In short, it would protect groups who have historically been determined by Congress and the courts to need special protections in a manner different from companion civil rights laws.

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

It is abundantly clear to us that no matter which classes are included under this construct, a tenants association or a group of persons advocating tenants rights at a private apartment complex is not a recognized class in this sense.

The truly troublesome issue is whether to also follow *McLellan II* by including the class of those who assert "fundamental rights," and if so, whether the Carchmans' rights are capable of being characterized in such "fundamental" terms. Pursuit of this approach requires we first identify those rights characterized as "fundamental." *McLellan II* unfortunately elided from the discussion of suspect classes (*i.e.* race, religion *et alia*) to "fundamental rights" without explaining the transition:

Being closely allied with fundamental rights, civil rights are open-ended in character . . . the Supreme Court lately has more than once expanded that class of those rights we consider fundamental.

545 F.2d at 932. As examples of "fundamental" rights, *McLellan II* cited *Roe v. Wade*, 410 U.S. 113 (1973), *Graham v. Richardson*, 403 U.S. 365 (1971) and *Griswold v. Connecticut*, 381 U.S. 479 (1965). These citations create further ambiguity: *Griswold* rested on the Ninth Amendment, and on a First Amendment right of association and a Fourth Amendment right of privacy "incorporated" into the Fourteenth Amendment due process clause and hence applicable to the states; *Roe* rested directly on the "liberty" assurance of the Fourteenth Amendment due process clause, rather than on any "incorporated" right; and *Graham* involved, not the due process, but the equal protection clause, and specifically that prong of the "new equal protection" that protects "fundamental" interests. See Gunther, "A Model for a Newer Equal

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

Protection," 86 *Harvard L. Rev.* 1, 8-9 (1972). Citation to these three cases suggest that the *McLellan II* court would include in "fundamental rights" for defining *Griffin* classes: (a) all bill of rights guarantees incorporated into the Fourteenth Amendment; (b) those "liberty" and "property" interests considered "fundamental" for Fourteenth Amendment due process adjudication, *see Tribe*. "Toward a Model of Roles in the Due Process of Life and Law" 87 *Harvard* 1 (1973); and (c) those "fundamental interests" requiring "strict scrutiny" when examined under the equal protection clause. Apparently, infringement of any of these rights amounts to "class-based invidiously discriminatory animus" for the *McLellan II* court.⁹ Under this analysis the Carchmans' asserted rights to free speech and association in the tenants organization would certainly be "fundamental," for as stated, *e.g.* in *United States v. Kras*, 409 U.S. 434, 446, "free speech . . . has come to be regarded as fundamental and . . . demand[s] the lofty requirement of a compelling governmental interest before [it] may be significantly negotiated." In sum, fidelity to *McLellan II* would compel the conclusion that the Carchmans, having asserted the fundamental rights of free speech and

⁹ In contrast, the court in *Bellamy v. Mason's Stores, Inc.*, 368 F.Supp. 1025 (E.D. Va. 1973) *aff'd* 508 F.2d 504 (4th Cir. 1974), limited the "fundamental interests" solely to those protected by strict scrutiny under the Equal Protection Clause. *Id.* at 1028.

A theoretical possibility not suggested by either *McLellan II* or *Bellamy* would be to include rights protected by the Privileges and Immunities Clause of Art. IV § 2 of the Constitution, and/or the similar clause of the Fourteenth Amendment. See cases analyzed in *Baldwin v. Fish and Game Commission of Montana*, No. 76-1150, 46 U.S.L.W. 4501, 4505 (May 23, 1978). See also *Hicklin v. Orbeck*, No. 77-324, decided June 22, 1978, 46 U.S.L.W. 4773.

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

association, have pleaded a class against which a "class-based animus" within the meaning of *Griffin* can be directed.¹⁰

¹⁰ Our opinion accepts at face value, as it must on a 12(b)(6) motion, the Carchman's assertion of rights of speech and association and their assertion that defendant is responsible for infringement of those rights. If this case were to have proceeded to trial, it might indeed appear (1) that the Carchmans are in fact not asserting a "fundamental" first amendment right, but rather a non-fundamental non-first amendment right; and (2) that even if they are asserting a first amendment right, defendant cannot be logically said to be responsible for its deprivation. Apparently what happened is that Phillip Carchman was an active, vocal member of the tenant association at his private apartment complex. His apartment lease was not renewed, he feels, because of this outspokenness. But, so phrased, is this an allegation that any "fundamental" first amendment right has been denied him? If Carchman is really asserting that he has a right to have his lease renewed, then he is alleging a violation, not of any first amendment right of speech and association, but of a right to an apartment lease renewal, which was held *not* to be fundamental by the Supreme Court in *Lindsey v. Normet*, 405 U.S. 56 (1972) (denying "strict scrutiny" by holding "Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions").

If, in the alternative, he is asserting a right to belong to the Meadowbrook Valley Tenants Association—which would implicate the first amendment rights of free speech and association—it is not clear why he must cease belonging to that organization. If the reason is that the by-laws of the tenant group require members to be residents of the apartment complex, then his real complaint is with the tenant association by-laws, not with the defendant. In contrast, if the by-laws permit Carchman to continue to be a member of the group after he moves, can it be said he is being deprived of any speech or associational rights simply because he would have to commute to participate in tenant association activities?

Another theoretical possibility is that Carchman believes defendant has pursued him to his new apartment, wherever it may be (if indeed he is a tenant elsewhere) and is intent on denying him his right to belong to *any* tenant organization, no matter which apartment or what landlord is involved. This is the only possibility whereby defendant can clearly be said to be denying Carchman his first amendment right to association in a tenant

(Footnote continued on following page)

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

We are persuaded, however, that the rights of speech and association, despite their legal fundamentality, may *not* be used to define *Griffin* classes for two reasons. First, permitting a *Griffin* "class" to be defined by those who exercise rights of speech or association would be in effect no limitation on the definition of a § 1985(3) class whatever. It

(Footnote continued from preceding page)

organization. This last possibility does not seem realistic in this case, but the point is that choosing among the possibilities would be inappropriate on a 12(b)(6) motion to dismiss. We have construed the complaint in the light most favorable to Carchman, resolving ambiguities in his favor, and have therefore assumed that first amendment rights are actually involved, and that defendant can logically be said to be the infringer of those rights.

In a somewhat related issue, we note that plaintiffs have alleged injury by virtue of only one act: the refusal of defendants to renew their lease. (§ 15 amended complaint). Defendants have cited several cases which would apparently support dismissal of the instant complaint on the grounds that refusal to renew the lease was a "spontaneous" act, rather than part of a "general pattern of discriminatory action directed to any class." *Hughes v. Ranger Fuel Corp.*, 467 F.2d 6 (4th Cir. 1972). In *Hughes*, plaintiffs, from a public highway, had been photographing defendants' coal operations to prove violation of federal anti-pollution laws. Coal company employees allegedly attacked them and beat them up. The 4th Circuit, in reviewing a 12(b)(6) dismissal, found that the "action of defendants was directed at the plaintiffs as individuals because they were engaged in attempting to photograph them (the defendants) and their activities on that particular occasion, not because of any animus against them as members of some class . . ." *Id.* at 10. In the case at bar, a similar conclusion might be reached, but, as we see it, only as a fuller factual record. Thus, we are puzzled as to how, in the context of a motion to dismiss, the Fourth Circuit could conclusively label the action in *Hughes* insufficient as a matter of law. Since 1985(3) requires a conspiracy, and hence an overt act, the assault and battery could plausibly be construed as that overt act in furtherance of the conspiracy. We think a distinction between a "spontaneous" act and "an act in furtherance of a conspiracy" best awaits proof at trial, or at the least a summary judgment motion, and that it is inappropriate to conclude that a particular act is *not* a manifestation of a conspiracy on a motion to dismiss.

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

would permit a virtually open-ended and limitless collection of groups to claim they were proper *Griffin* "classes." The disco dancers, vegetarians, *et alia* who we hypothesized would qualify under the *Means* standard, p. 9-12 *supra*, would also qualify under a "speech" or "association" related definition of "class-based animus," for any conspiracy aimed at a plaintiff as a *member* of any such organization (as it would have to be in order to satisfy the class-based *mens rea* requirement) would inevitably be interfering with that member's right to speak for the group and to associate with the group. Yet, *Griffin* clearly intended its "class" requirement to serve a limiting function. We believe that it would be improper to adopt as a method for constructing a "class" one that converts virtually every aggregation into such a "class." Therefore, the *Griffin* stricture inveighing against turning § 1985(3) into a "general federal tort law," which we earlier read as compelling our rejection of the *Means* "intellectual nexus" test, also compels our rejection of "classes" defined solely on the basis that the members of the groups assert rights of speech and association.

Secondly, defining a *Griffin* class solely on the basis that it consists of persons whose First Amendment rights have been infringed leads to analytical problems. Under *Griffin* the "class-based animus" requirement is clearly separate and independent from the issues of which rights are protected under § 1985(3) and whether Congress has the Constitutional power to compensate the victims of private conspiracies which violate rights protected by the bill of rights. (See n. 3 *supra*) In other words, under *Griffin*, the "class" criteria is an analytic construct different from the constructs employed to determine the identity of the federal rights intended to be protected and the constitutional scope of Congress' power to protect

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

those rights under § 1985(3).¹¹ If we define *Griffin* "classes" in terms of First Amendment rights, we must first decide whether First Amendment rights can be protected, via § 1985(3), from a wholly private conspiracy; that is far from a simple task. *See* n. 3 *supra*. If they cannot, then how can litigants possess a "fundamental right" to speech or association sufficient to constitute a *Griffin* "class"?¹²

The problem thus with the above mode of analysis is that the "class" requirement is subsumed within the rights protected requirement. We are forced to tie the definition of "class" inextricably to the question of Congressional intent and power in enacting § 1985(3), and prevented from analyzing the two issues separately, as *Griffin* requires. This consequence further impels us to reject the position that persons asserting First Amendment rights of free speech and association constitute a class against which "class based animus" within the meaning of *Griffin* can be directed. To that extent we decline to embrace the "fundamental interest" facet of *McLellan II*'s definition of *Griffin* classes. We need not, however, reach the question whether the two infirmities we have identified as inhering in the use of the rights of speech and association to define *Griffin* "classes" would

¹¹ In *Griffin*, the construct of race was used to define the "class" of those protected, and the rights of interstate travel and to be free from the badges and indicia of slavery formed the constructs for analyzing Congressional power. Hence, in *Griffin*, the analysis of class and the analysis of Congressional power were wholly separate and independent.

¹² Of course, if it is determined that Congress both intended to protect bill of rights guarantees from private conspiracies via § 1985(3) and has the Constitutional power to do so, then the First Amendment is a "fundamental" right arguably sufficient to define a *Griffin* "class."

Appendix A—Opinion of the United States District Court for the Eastern District of Pennsylvania of July 24, 1978.

similarly inhere in the use of any other "fundamental" rights and interests when used to identify *Griffin* classes. In other words, we intimate no view as to the propriety of employing other "fundamental" rights or interests to define *Griffin* classes.¹³

For the foregoing reasons, defendant's motion to dismiss the complaint must be granted. An appropriate order follows.

EDWARD R. BECKER, J.

¹³ Neither do we rule out the possibility that there may also be federal legislation expressly protecting the First Amendment rights of certain groups which might be sufficiently focused and narrowly enough drawn to create a proper *Griffin* class.

*Appendix A—Opinion of the United States District
Court for the Eastern District of Pennsylvania
of July 24, 1978.*

Order

**IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania**

PHILIP CARCHMAN and MARILYN R. CARCHMAN, h/w,

v.

THE KORMAN CORPORATION.

**Civil Action
No. 77-2477**

AND NOW, this 21st day of July, 1978, in consideration of the foregoing opinion, it is hereby ORDERED that defendant's motion to dismiss is GRANTED and that plaintiff's complaint as amended is DISMISSED for failure to state a claim upon which relief can be granted.

BY THE COURT:

EDWARD R. BECKER, J.

Supreme Court, U.S.
FILED

OCT 4 1979

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1978

No. 78-1909

PHILIP CARCHMAN and MARILYN R. CARCHMAN,
Petitioners,

v.

THE KORMAN CORPORATION,
Respondent.

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit**

PETITIONERS' SUPPLEMENTAL BRIEF

PAUL W. TRESSLER, Esquire
Attorney for Petitioners
392 Souderton-Harleysville Pike
P. O. Box 98
Franconia, Pennsylvania 18924
(215) 723-8991

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING WRIT	3
I. The Opinion of the United States District Court for the Eastern District of Pennsylvania Recog- nized that the Class of Tenants' Association Members Was the Class to Which the Carchmans Claimed Membership	3
II. 42 U.S.C. § 1985 (3) Does Protect Individuals From Private Conspiracies to Deprive Those Individuals of Their Rights of Free Speech, Association and Assembly	5
CONCLUSION	8

TABLE OF CITATIONS

Cases:	Page
Cox v. Louisiana, 379 U.S. 536 (1964)	6
Dickerson v. U.S. Steel Corp. 439 F. Supp. 55 (W.D. Pa. 1977)	6
Great American Federal Savings & Loan Ass'n. v. Novotny, 60 L. Ed. 2d 957 (1979)	5
Griffin v. Breckenridge, 403 U.S. 88 (1971)	5
Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977)	7
Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969) .	6
United States v. Harris, 106 U.S. 629 (1883)	7
Westberry v. Gilman Paper Co., 507 F. 2d 206 (5th Cir. 1975)	6

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I	5, 6, 7
United States Constitution, Amendment XIV	6, 7

STATUTES

28 U.S.C. § 1254	2
42 U.S.C. § 1985 (3)	2, 5, 6, 7

IN THE
Supreme Court of the United States

October Term, 1978.

No. 78-1909.

PHILIP CARCHMAN and MARILYN R. CARCHMAN,
Petitioners,

v.

THE KORMAN CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners, Philip Carchman and Marilyn R. Carchman, respectfully request this Court to issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on March 13, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, p.11) is reported at 594 F. 2d 354. The opinion of the District Court (Pet. App. A, p.15) is reported at 456 F. Supp. 730.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Whether tenant members of a tenants' association or tenants' rights advocates living in a large luxury apartment complex constitute a proper class protected under 42 U.S.C. § 1985 (3).
2. Whether 42 U.S.C. § 1985 (3) protects against private conspiracies to deprive individuals of their constitutional guarantees of free speech, association and assembly.

STATUTE INVOLVED

42 U.S.C. § 1985 (3), R.S. § 1980, reads as follows:

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing

or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF CASE

In that a statement and counter-statement of the facts of this case have already been presented in the Petition for Writ of Certiorari and Brief in Opposition, Petitioners feel that nothing would be gained by restating the facts herein.

REASONS FOR GRANTING WRIT

1. The Opinion of the United States District Court for the Eastern District of Pennsylvania Recognized That the Class

of Tenants' Association Members was the Class to which the Carchmans Claimed Membership.

One of the Respondent's major arguments opposing the granting a Writ of Certiorari in this matter is the wording fo the stipulation agreed to by counsel in Judge Edward Becker's chambers at a judicial conference in June of 1978. At that conference, Judge Becker went over the facts of the case with both counsel for Petitioners and Respondents and proposed the present stipulation in order that a decision on Respondent's motion to dismiss may be reached on the merits. Accordingly, the stipulation was agreed to and drafted by Judge Becker.

At that meeting in June of 1978 and in Judge Becker's subsequent opinion supporting his decision to grant Korman's motion to dismiss, Judge Becker recognized that the class of individuals to which the stipulation applied included members of apartment tenants' associations. In fact, Judge Becker noted that the facts of the case indicated that Carchman was "an active, vocal member of the tenant association at his private apartment complex." Opinion of the District Court (Pet. App. A, p. 31, footnote 10).

At no time was the stipulation which used the term "tenant organizers" deemed to exclude members of tenants' associations in the context in which it was used by the Court of Appeals. In their brief to the Court of Appeals and in oral argument, Petitioners repeatedly stated that it was the class of tenants' association members or tenants' rights advocates to which they belonged. This is the group which Judge Becker grouped under the term "tenant organizers" and that was the accepted meaning by all parties involved in the judicial conference in June of 1978 in Judge Becker's chambers.

It is difficult how Korman can now come forth and claim that the term "tenant organizers" be construed in its narrowest form to exclude members of organized tenants' associations such as the one at Meadowbrook to which the Carchman's belonged. Such a class of individuals, with its formal organization structure, elected officers, and the like should constitute a proper class under 42 U.S.C. § 1985 (3) and Griffin v. Breckenridge, 403 U.S. 88 (1971).

Accordingly, the Court should grant the Writ of Certiorari and review the Judgment rendered in this matter by the Court of Appeals for the Third Circuit.

II. 42 U.S.C. § 1985 (3) Does Protect Individuals From Private Conspiracies to Deprive Those Individuals of Their Rights of Free Speech, Association and Assembly.

Korman finally asserts that since the Carchman's did not challenge the dismissal of their First Amendment action against Korman alone, it logically follows that their action directed against Korman as a conspirator along with the Meadowbrook Valley Partnership, owners of the apartment complex in which the Carchmans were living, brought under section 1985 (3) must also necessarily fail.

Petitioners agree with the statement that section 1985 (3) does not in and of itself create substantive constitutional or civil rights but rather is basically implimenting legislation designed to provide a remedy for violations of the rights which are already guaranteed by the United States Constitution or by federal statutes. Great American Federal Savings & Loan Ass'n. v. Novotny, 60 L. Ed. 2d 957 (1979).

Still, 42 U.S.C. § 1985 (3) does address itself to wholly private conspiracies directed to members of protected classes

the object of such conspiracies is to deprive those persons of rights guaranteed against infringement. Such acts by purely private persons would not be actionable without 42 U.S.C. § 1985 (3) in that the First and Fourteenth Amendment only acts in protecting individuals from governmental action, either federal or state. However, the Congress recognized that individuals of easily recognized classes could also have those protected rights deprived by the actions of a group of private citizens who conspire towards such an end. The Fourteenth Amendment and 42 U.S.C. § 1985 (3) operate in tandem to private a cause of action against purely private parties, Westberry v. Gilman Paper Co., 507 F.2d 206 (5th Cir. 1975), and does not require that the defendants act under colour of state law. Jennings v. Shuman, 567 F.2d 1213 (3d Cir. 1977); Dickerson v. U.S. Steel Corp., 439 F. Supp. 55 (W.D. Pa. 1977).

There can be no doubt that the rights of free speech, association and assembly are federally protected rights and indeed such rights have been termed by this Court to be "fundamental", Cox v. Louisiana, 379 U.S. 536 (1964), and the very "essence of self-government". Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969). It is difficult to see how Korman can claim that the Carchmans are not asserting federally protected rights when they allege violations of their rights of free speech, association and assembly.

While the Carchmans' guarantees of free speech, association and assembly may not be protected against Korman should Korman act by itself, 42 U.S.C. § 1985 (3) does prohibit such acts when Korman acts with others, here the Meadowbrook Valley Partnership as alleged in Petitioner's Amended Complaint (Brief in Opposition, App. II, p.19). It becomes actionable in that section 1985 (3) reaches private conspiracies to deprive

individuals who are members of recognized classes of their rights and privileges under the Constitution and the laws. Jennings v. Shuman, supra.

The fact that section 1985 (3) reaches private conspiracies and that state action is not required to state a cause of action has been implicitly recognized by this Court since the decision in United States v. Harris, 106 U.S. 629 (1883). In Harris, the Court was construing the exact criminal counterpart to 42 U.S.C. § 1985 (3) and the analogy can be drawn to section 1985 (3). In Griffin v. Breckenridge, supra, concerning the lack of the need for state action under section 1985 (3), this Court stated:

Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985 (3) of all deprivation of "equal protection of the laws" and "equal privileges and immunities under the laws," whatever the source.

403 U.S. at 97. (Emphasis in original).

Accordingly, the Carchmans have alleged a violation of their rights under the First and Fourteenth Amendments relating to their freedoms of speech, association and assembly which freedoms are the very touchstone of American Democracy and our way of life. While not protected from infringement by private individuals acting alone, those freedoms have been deemed so precious, along with others, by the Congress that it decided that they deserved protection from private parties acting with others to deprive certain groups or classes of individuals of those very important rights. Such rights must be deemed as federally protected rights as to come under protection of 42 U.S.C. § 1985 (3).

CONCLUSION

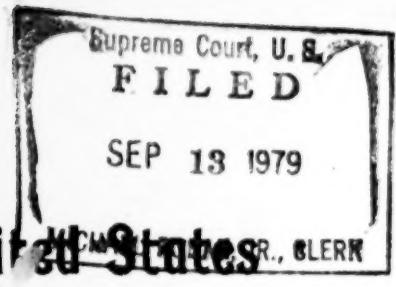
For the reasons stated above and in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

PAUL W. TRESSLER, Esquire
392 Souderton-Harleysville Pike
P. O. Box 98
Franconia, Pennsylvania 18924
(215) 723-8991

Attorney for Petitioners,
Philip and Marilyn R. Carchman

Dated: October 3, 1979



October Term, 1978

No. 78-1909

PHILIP CARCHMAN and MARILYN R. CARCHMAN,
Petitioners,

v.

THE KORMAN CORPORATION,
Respondent.

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit.**

RESPONDENT'S BRIEF IN OPPOSITION.

**STEVEN A. ARBITTIER,
BARBARA E. ETKIND,
Twelfth Floor, Packard Building,
Philadelphia, Pennsylvania 19102
(215) 569-4000**

*Attorneys for Respondent,
The Korman Corporation.*

Of Counsel:

**WOLF, BLOCK, SCHORR AND SOLIS-COHEN,
Twelfth Floor, Packard Building,
Philadelphia, Pennsylvania 19102
(215) 569-4000**

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	5
I. Petitioners Have Reduced Their Case to an Attempt to Seek an Additional Amendment to the Pleadings	5
II. There Is No Conflict Among the Circuits Over Whether Tenant Organizers or Members of a Tenants' Association Constitute a § 1985(3) Class ..	6
III. The Decision of the Court of Appeals for the Third Circuit Was Correct	10
IV. Petitioners Have Not Alleged Deprivation of a Federal Right Protected From Infringement by 42 U. S. C. § 1985(3)	11
CONCLUSION	13
APPENDIX I	15
APPENDIX II	18
APPENDIX III	21

TABLE OF CITATIONS.

Cases:	Page
Action v. Gannon, 450 F. 2d 1227 (8th Cir. 1971)	9
Azar v. Conley, 456 F. 2d 1382 (6th Cir. 1972)	9
Baer v. Baer, 450 F. Supp. 481 (N. D. Cal. 1978)	7
Bellamy v. Mason's Stores, Inc. (Richmond), 508 F. 2d 504 (4th Cir. 1974)	9
Cameron v. Brock, 473 F. 2d 608 (6th Cir. 1973)	7
Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U. S. 94 (1973)	12
Conroy v. Conroy, 575 F. 2d 175 (8th Cir. 1978)	7
Great American Federal Savings & Loan Association v. Novotny, 47 U. S. L. W. 4681 (U. S. June 11, 1979)	7, 12
Griffin v. Breckenridge, 403 U. S. 88 (1971)	4, 5, 6, 7, 8, 10, 11
Hudgens v. N. L. R. B., 424 U. S. 507 (1976)	12
Kimble v. D. J. McDuffy, Inc., 445 F. Supp. 269 (E. D. La. 1978)	10
McLellan v. Mississippi Power & Light Company, 545 F. 2d 919 (5th Cir. 1977) (en banc)	8, 9
Marlowe v. Fisher Body, 489 F. 2d 1057 (6th Cir. 1973)	7
Means v. Wilson, 522 F. 2d 833 (8th Cir. 1975), cert. denied, 424 U. S. 958 (1976)	7, 8
Morgan v. Odem, 552 F. 2d 147 (5th Cir. 1977)	8
Murphy v. Mount Carmel High School, 543 F. 2d 1189 (7th Cir. 1976)	8-9
Novotny v. Great American Federal Savings & Loan Associa- tion, 584 F. 2d 1235 (3d Cir. 1978) (en banc), rev'd on other grounds, 47 U. S. L. W. 4681 (U. S. June 11, 1979)	7
Ohio Inns, Inc. v. Nye, 542 F. 2d 673 (6th Cir. 1976), cert. denied, 430 U. S. 946	8
Phillips v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 118, 556 F. 2d 939 (9th Cir. 1977)	8, 9
Public Utilities Commission v. Pollak, 343 U. S. 451 (1952) ..	12
Westberry v. Gilman, 507 F. 2d 206 (5th Cir. 1975)	9

TABLE OF CITATIONS (Continued).

Constitutional Provisions:	Page
United States Constitution Amendment I	2, 4, 9, 11
Statutes:	
28 U. S. C. § 1254(1)	2
42 U. S. C. § 1985(3), R. S. § 1980	3, 4, 5, 6, 7, 8, 9, 10, 11, 12

IN THE
Supreme Court of the United States

October Term, 1978.

No. 78-1909.

PHILIP CARCHMAN and MARILYN R. CARCHMAN,
Petitioners,
v.

THE KORMAN CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION.

Respondent, The Korman Corporation, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 13, 1979.

OPINIONS BELOW.

The opinion of the Court of Appeals (Pet. App. A, p. 11) is reported at 594 F. 2d 354. The opinion of the District Court (Pet. App. A, p. 15) is reported at 456 F. Supp. 730.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on March 13, 1979. By an order dated June 7, 1979, Justice Brennan granted petitioners' application for an extension of time until June 29, 1979, in which to file a petition for a writ of certiorari. The petition was filed on June 25, 1979. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether alleged animus against tenant organizers constitutes "invidiously discriminatory class-based animus" for the purpose of 42 U. S. C. § 1985(3), so as to convert an ordinary landlord-tenant dispute into a civil rights violation.
2. Whether 42 U. S. C. § 1985(3) in and of itself protects against private infringement First Amendment rights which are otherwise protected only against government interference.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

Amendment I to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U. S. C. § 1985(3), R. S. § 1980, provides:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE.

Some statement of the history of the case is required because petitioners have felt free to make assertions which were presented neither to the Court of Appeals nor to the

District Court and which are indeed affirmatively contradicted by the record.

The original complaint (Appendix I) was based entirely on the First Amendment and charged Korman with a conspiracy directed against Philip Carchman.

After a motion to dismiss, the Carchmans added by amendment (Appendix II) a second count alleging a violation of 42 U. S. C. § 1985(3), but still not alleging any class-based animus as required by *Griffin v. Breckenridge*, 403 U. S. 88 (1971). Korman again filed a motion to dismiss.

During a subsequent status conference District Judge Edward R. Becker agreed that the absence of an allegation of class-based animus would require dismissal. During the course of the conference, however, the District Court permitted counsel for the Carchmans further to amend the complaint to allege "that the actions of defendant complained of were motivated by invidiously discriminatory class-based animus against a class of tenant organizers" (Appendix III).

Thereafter, the District Court granted Korman's motion to dismiss the amended complaint on the grounds that Count I failed to state a cause of action under the First Amendment because no state action was alleged and Count II failed to state a cause of action under 42 U. S. C. § 1985 (3) because it did not allege a cognizable class-based animus.

On appeal to the Third Circuit, the Carchmans challenged only the dismissal of their § 1985(3) claim, which the Court of Appeals affirmed on the ground that tenant organizers do not constitute a class protected by the statute. The Carchmans' petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT.

I. Petitioners Have Reduced Their Case to an Attempt to Seek an Additional Amendment to the Pleadings.

The petition (page 8) expressly acknowledges that: The Court of Appeals was justified in holding a class of tenant organizers does not qualify under the *Griffin v. Breckenridge*, *supra*, interpretation of a proper section 1985(3) class.

What petitioners now contend is that the decision should have addressed itself to the class of the tenants' association, asserting:

The tenant's association to which the Carchmans belonged had a formal organizational structure, it was organized as a non-profit corporation under the laws of the Commonwealth of Pennsylvania, and had an easily recognized membership.

It is *this* class which the Carchmans contend is a proper class for protection under section 1985(3).

Petition at 8.

But the Court of Appeals addressed itself to the class ("tenant organizers") which the Carchmans alleged in their third and final pleading, and which they now concede to be insufficient. In effect, the petition asks this Court to permit a fourth pleading, to avoid the decision of the Court of Appeals.

We do not for a moment acknowledge that a tenants' association is an adequate class within the rule of *Griffin v. Breckenridge*, *supra*. But whether such an association is a cognizable class for that purpose is an issue which is not presented by this record.

II. There Is No Conflict Among the Circuits Over Whether Tenant Organizers or Members of a Tenants' Association Constitute a § 1985(3) Class.

Petitioners do not seek to resolve a genuine difficulty in the interpretation of *Griffin v. Breckenridge*; they seek to have the case reconsidered.

The petition makes much of the District Court's discussion of two lines of cases dealing with the nature of the class required by *Griffin v. Breckenridge, supra*. But whether or not all these cases can be fully reconciled, in holding or in rationale, the present action is not an appropriate vehicle for analysis of the issues raised by these decisions. It stands wholly apart from the spectrum reflected in the decisions cited. The hard fact is that the Carchmans claim to have been denied renewal of a lease because of activities regarded as inimical by the landlord. To say that they can utilize § 1985(3) by making reference to a class of organizers, a class of members of a tenants' association, or the like, would be to overrule *Griffin v. Breckenridge, supra*, or to turn it into nothing more than a test for the semantic resourcefulness of counsel.

There is clearly no conflict among the lower federal courts over the precise issue which the granting of the Carchmans' petition would present to this Court. The Carchmans have not cited, and Korman has not been able to locate, any decision other than those below dealing with the issue of whether tenant organizers, or members of a tenants' association, constitute a cognizable class under 42 U. S. C. § 1985(3).

Nor do the decisions of those federal courts which have considered whether various groups constitute § 1985(3) classes present the type of "conflict in principle" which the Carchmans have attempted to portray in order to obtain this Court's review of the decision below. On

the contrary, there exists among those federal courts which have considered the issue a marked uniformity of opinion as to the criteria for a § 1985(3) class.

On the one hand, the courts have apparently construed the "racial, or perhaps otherwise class-based invidiously discriminatory animus" language in *Griffin* as requiring, if not racial discrimination, discrimination on the basis of a trait bearing at least some of the attributes of race. Thus, because sex, like race, is a congenital and unalterable trait, sexual discrimination has been held to be within the purview of § 1985(3). *Novotny v. Great American Federal Savings & Loan Association*, 584 F. 2d 1235, 1243 (3d Cir. 1978) (*en banc*), *rev'd on other grounds*, 47 U. S. L. W. 4681 (U. S. June 11, 1979); *Conroy v. Conroy*, 575 F. 2d 175 (8th Cir. 1978). Similarly, because membership in a religious minority, like membership in a racial minority, has historically resulted in oppression by the majority, religious discrimination has also been found to be encompassed by the statute. *Marlowe v. Fisher Body*, 489 F. 2d 1057 (6th Cir. 1973); *Baer v. Baer*, 450 F. Supp. 481, 491 (N. D. Cal. 1978).

The courts also have consistently recognized discrimination on the basis of political loyalty (*i.e.*, support of a particular political candidate) as within the ambit of § 1985(3). *Means v. Wilson*, 522 F. 2d 833 (8th Cir. 1975), *cert. denied*, 424 U. S. 958 (1976); *Cameron v. Brock*, 473 F. 2d 608 (6th Cir. 1973). While political loyalty may not share with race the characteristics of immutability or historical oppression, the courts have apparently been satisfied with the fact that the inherent connection between the exercise of civil rights and the support of a political candidate renders it highly unlikely that wrongful action directed against supporters of a political candidate would be merely tortious, which is the evil

against which *Griffin*'s requirement of class-based animus was designed to protect. 403 U. S. at 102. Thus, the holding in *Means v. Wilson, supra*—that Indian supporters of a political candidate for tribal election and members of the American Indian Movement constitute a § 1985(3) class—is considerably narrower than the “intellectual nexus” test approved therein and on which the Carchmans place primary reliance.

On the other hand, the courts have refused to extend § 1985(3) protection to any mere aggregation of individuals. *Phillips v. International Association of Bridge, Structural and Ornamental Iron Workers, Local 118*, 556 F. 2d 939 (9th Cir. 1977) (dissenting union members not a cognizable class); *Morgan v. Odem*, 552 F. 2d 147 (5th Cir. 1977) (class of “newcomers” to a particular parish not cognizable under § 1985(3)); *McLellan v. Mississippi Power & Light Company*, 545 F. 2d 919 (5th Cir. 1977) (*en banc*) (class of those discharged from employment because of their filing petitions in bankruptcy not cognizable under § 1985(3)); *Ohio Inns, Inc. v. Nye*, 542 F. 2d 673 (6th Cir. 1976), *cert. denied*, 430 U. S. 940 (discrimination against non-union employers not class-based animus under *Griffin*). *See also* cases cited by the Carchmans at p. 7 of their petition. The Court of Appeals for the Seventh Circuit explained the rationale of the above decisions in rejecting (on other grounds) a § 1985(3) claim by non-union hospital employees:

The class is small and its constituency dependent on circumstances subject to ready change. Its character is quite different from classes based on race, ethnic origin, sex, religion and political loyalty. Although we do not reach the question, we doubt whether it fulfills the *Griffin* requirement.

Murphy v. Mount Carmel High School, 543 F. 2d 1189, 1192, n. 1 (7th Cir. 1976).

The decision of the court below thus presents no conflict, even “in principle”, with pre-existing § 1985(3) case law,¹ since it fits squarely within the second category of cases, in which the courts have consistently refused to extend § 1985(3) protection to any mere aggregation of individuals, even though some of those groups were obviously exercising First Amendment rights as well (*see, e.g.*, *Phillips, supra* (dissenting union members not a § 1985(3) class)).

1. Nor do any of the other cases cited in the petition present any real conflict among the Circuits. By recognizing a § 1985(3) cause of action against defendants “stimulated . . . by racial and economic motives” in *Action v. Gannon*, 450 F. 2d 1227, 1232 (8th Cir. 1971), the Eighth Circuit merely applied the statute to the very core of its intended coverage.

Although a single white middle class family did maintain a § 1985(3) action in *Azar v. Conley*, 456 F. 2d 1382 (6th Cir. 1972), the only issue before the court in that case was the necessity for specific intent. Thus, the Sixth Circuit in *Azar* expressly noted that the issue of whether the protection of § 1985(3) extended to a white middle class family had not been raised in the trial court and therefore would not be decided on the appeal. 456 F. 2d at 1386-87, n. 5.

Similarly, since in *Bellamy v. Mason's Stores, Inc. (Richmond)*, 508 F. 2d 504 (4th Cir. 1974), the Fourth Circuit affirmed the dismissal of a § 1985(3) complaint on the ground that § 1985(3) does not provide a cause of action for private interference with the right of association, it never reached the issue of whether discrimination on the basis of political association is “class-based” discrimination within the meaning of § 1985(3).

In rejecting a § 1985(3) claim on behalf of bankrupts in *McLellan v. Mississippi Power & Light Co.*, 545 F. 2d 919 (5th Cir. 1977) (*en banc*), the Fifth Circuit went so far as to reserve expressly the issue “whether Congress intended that *only* racial bias would activate § 1985(3)”. 545 F. 2d at 929. As recognized by the petitioners, that court's previous decision and opinion in *Westberry v. Gilman*, 507 F. 2d 206 (5th Cir. 1975), which had held that environmentalists were a class protected by § 1985(3), has been vacated and withdrawn as moot so as to “spawn no legal precedents”. 507 F. 2d at 216.

Only if the Carchmans had alleged discrimination on the basis of their race, religion, sex or political loyalty would the dismissal of their amended complaint have created such a conflict. On the contrary, since the decision below is in accord with the criteria which the lower courts have developed for determining whether a § 1985(3) class exists, there is no need for review of it by this Court.

III. The Decision of the Court of Appeals for the Third Circuit Was Correct.

Not only is the decision below consistent with the decisions of the other lower federal courts, it is also correct, and there is, therefore, no need for review by this Court.

The purpose of this Court's requirement in *Griffin v. Breckenridge, supra*, of "some racial, or perhaps otherwise class-based invidiously discriminatory animus" was to prevent 42 U. S. C. § 1985(3) from becoming a general federal tort law. 403 U. S. at 102. That purpose can only be served, however, by a *limiting* definition of "class", rather than the all-inclusive definition that would be required to bring a group of tenant organizers within the protection of the statute.

As even the Carchmans recognize (petition at 8), if a group of tenant organizers were within the ambit of 42 U. S. C. § 1985(3), there would be no limit upon the numbers or types of groups cognizable under that statute. A member of any aggregation of two or more individuals—"pedestrians who walk on a certain street, . . . motorists who drive on a particular road, or . . . people who wear blue shirts . . ." (*Kimble v. D. J. McDuffy, Inc.*, 445 F. Supp. 269, 275 (E. D. La. 1978))—could then successfully maintain an action under § 1985(3). That such would be the ultimate result is vividly illustrated by the

facts of the present case—in which an ordinary landlord-tenant dispute would purport to become the subject of a federal action.

Nor is petitioners' characterization of their group as a tenants' association exercising First Amendment freedoms any more limiting. Indeed, because the First Amendment freedom of association inheres in all types of aggregations of individuals, a definition of a § 1985(3) "class" based on the exercise of First Amendment rights would amount to no limitation at all. A member of any group would qualify under an "associational" definition of class-based animus, because any conspiracy aimed at him or her as a member of any such group would be interfering with that member's right to associate with the group. Thus, because defining a class by its exercise of First Amendment rights would no more serve the limiting function required by this Court in *Griffin v. Breckenridge* than a definition which includes tenant organizers *per se*, the Court of Appeals acted properly in dismissing the Carchmans' complaint, regardless of whether it considered the alleged class to be a group of tenant organizers or a tenants' association.

IV. Petitioners Have Not Alleged Deprivation of a Federal Right Protected From Infringement by 42 U. S. C. § 1985(3).

There is a clear alternate ground for affirmance of the decision which is independent of the issue to which the petition addresses itself.

The Carchmans have never challenged the District Court's holding that the amended complaint fails to state a cause of action directly under the First Amendment because it does not allege state action on the part of Korman or any of its alleged co-conspirators (Pet. App. A at 16,

456 F. Supp. at 732). *Hudgens v. N. L. R. B.*, 424 U. S. 507, 513 (1976); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S. 94, 114 (1973); *Public Utilities Commission v. Pollak*, 343 U. S. 451, 461 (1952). Nor is there any other basis extrinsic to 42 U. S. C. § 1985(3) for claiming a "free speech" right *against Korman*. It is, apparently, the Carchmans' position that 42 U. S. C. § 1985(3) in and of itself creates a right to be free from other private individuals' complaining about what one says or with whom one associates.

42 U. S. C. § 1985(3), however, only protects rights conferred by federal sources independent of the statute itself. As this Court stated in *Great American Federal Savings & Loan Association v. Novotny*, 47 U. S. L. W. 4681 (U. S. June 11, 1979), decided after the decision below:

Section 1985(c) . . . creates no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by this section.

47 U. S. L. W. at 4684.

CONCLUSION.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STEVEN A. ARBITTIER,
BARBARA E. ETKIND,

Twelfth Floor, Packard Building,
Philadelphia, Pennsylvania 19102
(215) 569-4000

*Attorneys for Respondent,
The Korman Corporation.*

Of Counsel:

WOLF, BLOCK, SCHORR AND SOLIS-COHEN,
Twelfth Floor, Packard Building,
Philadelphia, Pennsylvania 19102
(215) 569-4000

Dated: September 13, 1979

APPENDIX I.

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

Civil Action No. 77-2477

**PHILIP CARCHMAN and MARILYN R. CARCHMAN,
his wife.**

v.

THE KORMAN CORPORATION

Complaint.

1. The action arises under the First Amendment to the Constitution of the United States, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of **TEN THOUSAND (\$10,000.00) DOLLARS.**

2. Plaintiffs are **PHILIP and MARILYN R. CARCHMAN, man and wife, residing at 1071 Frederick Road, Meadowbrook, Montgomery County, Pennsylvania.**

3. Defendant is **THE KORMAN CORPORATION, a Pennsylvania corporation with its principal place of business located at 101 Greenwood Avenue, Jenkintown, Pennsylvania.**

4. Plaintiff **PHILIP CARCHMAN** was an officer in the Meadowbrook Apartments Tenants Association, Inc., living

in Meadowbrook Apartments, Huntingdon Pike, Huntingdon Valley, Montgomery County, Pennsylvania. Defendant KORMAN CORPORATION was and is the managing agent of Meadowbrook Apartments.

5. Plaintiff PHILIP CARCHMAN was, in his position as an officer of the Tenants Association, an active advocate of tenant's rights at the Meadowbrook Apartments. While such an advocate, Plaintiff, PHILIP CARCHMAN was involved in a 1974 criminal suit in Pennsylvania State Court against Defendant KORMAN CORPORATION.

6. As a result of Plaintiff PHILIP CARCHMAN's active role in the tenants association, he was labeled as undesirable by Defendant KORMAN CORPORATION and forced to vacate his apartment at Meadowbrook Apartments on or about September 30, 1975.

7. Plaintiffs PHILIP CARCHMAN and MARILYN R. CARCHMAN had, up to and including September 30, 1975, complied with all the covenants and provisions of their lease with Defendant KORMAN CORPORATION.

8. Defendant KORMAN CORPORATION's sole reason for denying Plaintiffs renewal of their lease was Plaintiff PHILIP CARCHMAN's active role in the Meadowbrook Tenants Association and Defendant's action was designed to stifle and discourage Plaintiffs exercise of his freedoms of speech and association as guaranteed by the First Amendment of the Constitution of the United States.

9. As a result of Defendant's conduct, Plaintiffs were forced from their home and forced to seek living accommodations elsewhere, causing Plaintiffs considerable expense in moving to a new home.

10. Plaintiff MARILYN R. CARCHMAN was required to undergo expensive medical treatment as a result of the

trauma and anxiety caused by Defendant's course of conduct.

WHEREFORE, Plaintiffs demand judgment against Defendant for compensatory and punitive damages in an amount in excess of TEN THOUSAND (\$10,000.00) DOLLARS, plus interest and costs of this suit.

/s/ PAUL W. TRESSLER

Paul W. Tressler, Esquire

Attorney for Plaintiffs

392 Souderton-Harleysville Pike

P. O. Box 98

Franconia, Pennsylvania 18924

APPENDIX II.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2477

PHILIP CARCHMAN and MARILYN R. CARCHMAN,
h/w

v.

THE KORMAN CORPORATION

**Motion to Amend Plaintiff's Complaint as a Matter of
Course Under F. R. Civ. P. 15(a).**

Plaintiffs PHILIP CARCHMAN and MARILYN R. CARCHMAN, by their attorney, Paul W. Tressler, Esquire, request leave of court pursuant to Rule 15(a) of the Federal Rules of Civil Procedure to file the following amendment to their Complaint as a matter of course, heretofore filed in the above entitled and numbered cause. Such proposed amendment is as follows:

COUNT II

11. Plaintiffs reallege the allegations contained in paragraphs 1 to 10 of their Complaint as fully as if they were stated at length herein.

12. This claim arises under Title 42 of the United States Code, Section 1985, and this court has jurisdiction under Title 28 of the United States Code, Section 1343.

13. Between May of 1973 and September 30, 1975, defendant KORMAN CORPORATION along with their agents, WILLIAM C. LISS, General Manager of Meadowbrook Apartments, and STEVEN A. ARBITTER, ESQUIRE, and J. E. DRATCH, M. B. DRATCH, M. DRATCH, H. A. & L. HONICKMAN, B. E. KORMAN, L. I. KORMAN, S. H. KORMAN, S. J. KORMAN, J. M. LANSFIELD, I. B. MOSS, S. R. MOSS, E. TAXIN, M. A. TAXIN GRABOV and R. N. TAXIN, trading as the MEADOWBROOK VALLEY PARTNERSHIP with a business address at 101 Greenwood Avenue, Jenkintown, Pennsylvania 19046, maliciously and with intent to injure Plaintiffs, conspired together to deprive Plaintiffs of having and exercising the rights and privileges of citizens of the United States, namely their rights of speech and association as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

14. The individuals named as trading as the MEADOWBROOK VALLEY PARTNERSHIP are the owners of the Meadowbrook Apartments.

15. In furtherance of the conspiracy, KORMAN CORPORATION, through its agent WILLIAM C. LISS, refused to renew Plaintiff's lease at Meadowbrook requiring Plaintiffs to vacate their apartment by September 30, 1975.

16. The action by KORMAN, its agents, and the MEADOWBROOK VALLEY PARTNERSHIP, were in retaliation for Plaintiff's active participation in the Meadowbrook Tenant's Association and were also to prevent Plaintiff's further exercise of their rights of speech and association with respect to the tenant's association.

17. Plaintiff's had, up to and including September 30, 1975, complied with all the requirements and covenants of their lease at Meadowbrook.

18. Defendant KORMAN's sole motivation for the refusal to renew Plaintiff's lease was to deprive Plaintiff's exercise of their rights of speech and association.

19. As a result of the wrongful acts of KORMAN, its agents, and the MEADOWBROOK VALLEY PARTNERSHIP in terminating Plaintiff's lease for the reasons mentioned above, Plaintiffs were forced to undergo the expense of finding and moving to a new home, Plaintiff Marilyn R. Carchman was required to undergo medical treatment for the trauma caused by the acts described above, and were otherwise damaged by their dislocation.

WHEREFORE, Plaintiffs demand judgment against defendant in the amount of Fifty Thousand Dollars (\$50,000.00) compensatory damages and Two Hundred and Fifty Thousand Dollars (\$250,000.00) punitive damages.

/s/ PAUL W. TRESSLER
 Paul W. Tressler, Esquire
 Attorney for Plaintiffs
 392 Souderton-Harleysville Pike
 P. O. Box 98
 Franconia, Pennsylvania 18924
 Phone: (215) 723-8991

APPENDIX III.

IN THE UNITED STATES DISTRICT COURT FOR THE
 EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-2477

PHILIP CARCHMAN and MARILYN R. CARCHMAN,
 h/w

v.

THE KORMAN CORPORATION

Order.

AND Now, this 19th day of May, 1978, after hearing and by agreement of counsel, it is hereby ORDERED that plaintiff's complaint be deemed further amended to allege that the actions of defendant complained of were motivated by invidiously discriminatory class-based animus against a class of tenant organizers. Defendant's motion to dismiss shall be treated as applicable to the complaint as hereby amended.

By THE COURT:

/s/ EDWARD R. BECKER
 Edward R. Becker, J.